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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF: JOHN RUFFALO, JR.,
Petitioner.

REPLY BRIEF OF PETITIONER
On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

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The Reply brief on behalf of Petitioner Ruffalo will answer the arguments of the Amicus Curiae Bar Associations in the order in which the arguments appear in their brief.

APPLICABLE RULE.

The Amicus Curiae brief states the present, amended rule of the Court of Appeals, but this is not the rule under which Petitioner Ruffalo was cited. At the time of the order to show cause in this case Rule 6 (3) of the Court of Appeals for the Sixth Circuit provided:

> "Any member of the bar of this court who is disbarred or suspended in any court of record shall, because thereof, be stricken from the roll of counsel, unless within a time to be fixed by this court, and after notice mailed by the clerk to the address on the roll, he shall show that such disbarment or suspension is no longer in effect."

Petitioner argued that under *Selling* and *Theard* he was at least entitled to show cause why the state court suspension should not be followed. The Court of Appeals

did allow Ruffalo to show cause, and thereafter amended its rule to provide for a showing of cause in future cases, and also added the language, on which the Amicus Curiae seems to rely, providing for disbarment for "conduct unbecoming a member of the bar of the court." The case below was briefed, and argued, and decided on the issue whether the federal courts should accept the state court findings on charges 8 and 13 as justifying federal disbarment, without reference to whether the conduct was or was not "unbecoming a member of the bar of the court."

The general principle that a court may disbar a practitioner for unbecoming conduct has been applied fairly often where the conduct occurred in the presence of the court and consisted of flagrant contempt or gross disrespect, as in cases of repeated, offensive intoxication in court, cited by the Amicus Curiae.

Where the questioned conduct occurs outside the court's presence, then the phrase "unbecoming conduct" must be taken to mean conduct universally held to be reprehensible, such as the commission of a crime involving turpitude, violation of clear prohibition in the Canons of Ethics, or violation of the court's own published standards of professional conduct. In the instant case, the Ohio Supreme Court's rule XXVII (5) defines misconduct as commission of crime or violation of any Canon, but does *not* list "unbecoming conduct" as a ground. "Unbecoming conduct" is far too vague to justify disbarment when the conduct has never been so described in any reference or source material.

REPLY TO STATEMENT OF THE CASE.

It is said by the Amicus Curiae that Petitioner Ruffalo was suspended under Charge 13 for hiring Michael Orlando "as an undercover agent." The same term, "undercover agent," is repeated throughout the brief. This is skillful use of epithet. The connotation of "undercover agent" is that he has access to important confidential information which he steals from his employer's files to deliver to another. In the usual sense of the word Orlando was never an "agent" and never an "undercover" operative or agent. For forty hours a week he was a night shift car inspector. There was **no evidence** that he ever worked for Ruffalo during those forty work week hours. In his off-duty hours he did the usual work of an investigator. There is **no evidence** that he ever concealed his identity or concealed the fact he was working for Ruffalo when he interviewed a witness or drove one to the courthouse for trial. There was **no evidence** of any active concealment of Orlando's work or activities.

It has been conceded in all the courts below that everything Orlando did in any investigation was perfectly proper in the cases against the Pennsylvania, P. & L. E. and other railroads; and that it would have been completely ethical for Ruffalo to have a second investigator, employed by any other railroad, to investigate his B. & O. cases.

Charge 13 does not use the epithet "undercover agent." It charges that Ruffalo "paid Orlando monies for preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando." The language of the Ohio Supreme Court was that "one who believes that it is proper to employ and pay another to work against the interest of his regular employer is not qualified to be a member of the Ohio Bar." (A. 8.)

The Amicus Curiae suggests that Petitioner Ruffalo does not challenge the "*correctness*" of the final judgment of the Ohio Supreme Court suspending him from practice. It would be more accurate to say he does not challenge its finality. He has consistently disputed its correctness, in the District Court, the Court of Appeals, and in this Court.

THE ADDITION OF CHARGE 13.

The Amicus Curiae says that the charge concerning the hiring of Orlando "was based chiefly on the testimony of Orlando." This is not accurate. The Petitioner Ruffalo had made a complete statement on the whole subject, in page after page of open colloquy with the Examiners, before the charge was added (A. 122a-129a). Although he was then given opportunity to answer, there was no way he could either withdraw or explain the facts he had clearly stated—to the effect that Orlando wa only an investigator of cases and not a solicitor of cases as charged.

The language of the examiner when the charge was added was: "Now, the only evidence we are depending upon is that from his own lips to you gentlemen and from Orlando. We don't have anything else to support it" (A. 133a).

REPLY TO ARGUMENT.

It is argued that the court below met the test of *Selling v. Radford* (1917), 243 U. S. 46 at 51, whether "the state procedure from want of notice or opportunity to be heard was wanting in due process." The want of advance notice that the conduct would be considered wrongful violated substantive due process. The want of notice of the particular charge violated procedural due process. It must be assumed that this Court, in *Selling*, was quite aware of both substantive and procedural due process requirements and used the phrase "want of notice" in both senses.

The Bar Association's brief says that Petitioner Ruffalo could not claim he was denied procedural due process, citing *Randall v. Brigham,* 74 U. S. (7 Wall.) 523, 540. He was indeed denied procedural due process, and could so claim, but has not pressed the point simply because the violation of substantive due process, the major issue, is so clearly established. *Randall* held that when the misconduct did not concern matters occurring in open court then "notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense." In Petitioner's hearing no notice was given to him that it would be considered a disbarment offense to let Orlando work on B. & O. cases until *after* both Orlando and Petitioner Ruffalo had testified at length on every material fact concerning the charge. The situation presented is no different from amending an indictment to conform to the testimony after the accused has taken the stand to testify. This was wrong. The fact he was given time and opportunity to "explain" is meaningless. He was given no opportunity to un-testify and expunge the earlier statements.

THE PETITIONER WAS NOT WARNED BY THE LAW OF SEVEN CENTURIES THAT HIS CONDUCT WAS WRONG.

It is a false issue to argue that any conduct unbecoming a member of the bar warrants suspension. We would concede that if conduct were so patently wrongful that it would be universally recognized as demonstrating bad character, then the court could disbar. It is Petitioner's claim here that there was no recognition in any Canon, in any statute, nor in any decided case that what he actually did in using Orlando was wrong for a lawyer trying F. E. L. A. cases.

The Amicus Curiae brief suggests a violation of Canon 15—although the Supreme Court of Ohio did not find this canon applied to the facts. Canon 15 says in part that:

> "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied."

The language would seem to encourage the best and most effective preparation that could *lawfully* be accomplished. The Canon further says, as quoted in the Amicus Curiae brief:

> "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."

The word "chicane" has not been in popular use since Queen Victoria's day, and the lawyer reading it as a guide to conduct would undoubtedly be driven to Webster's New International Dictionary where it is defined:

> "Chicane. The use of artificial subterfuge to draw attention away from the merits of a case or question."

There is no issue in this case that could properly be encompassed by the term "chicane," which means pettifoggery or quibbling. The term "fraud" is common enough and means always an "intentional perversion of the truth" which is "intended to deceive another so that he acts on it to his legal injury," in both Webster's and Black's lexicon.

There is no way to apply "fraud" to the fact that Orlando when *off-duty* took statements from witnesses and furnished transportation to court. There is no whisper of

evidence that Orlando ever suborned perjury, suppressed truth, manipulated facts, or helped prepare a false case.

The most that can be said is that neither Ruffalo nor Orlando ever took affirmative action to tell the B. & O. Railroad that one of its night-shift car inspectors had a second job, helping his follow-employees or their widows to find the facts in F. E. L. A. cases.

PETITIONER WAS NOT WARNED BY DECISIONS.

The Amicus Curiae brief argues that *In re McBride* (1956) 164 Ohio St. 419, 132 N. E. 2d 113; and *Mahoning County Bar Association v. Franko,* 168 Ohio St. 17, 151 N. E. 2d 17, should have warned Petitioner that the court would enforce vague standards as to unbecoming conduct. The reverse is true. The claim of the accused attorney in *McBride* was that the only ground for disbarment was the legislature's standard in Sec. 1707 Ohio Gen. Code, which provided disciplinary action for professional misconduct "involving moral turpitude." The Ohio Supreme Court held that it had inherent power to provide its own additional standards and had spelled out standards in its own Rules. Section 2 of its then rules prohibited solicitation and Section 3 prohibited the employment of another to solicit, both of which rules McBride had "brazenly violated." The Court further observed that in addition to the violation of prescribed standards, "such conduct is universally condemned as a gross impropriety."

In *Franko* the Ohio Supreme Court suspended a county judge for his proven violation of Canon 30 of the Canons of Judicial Ethics. These Canons had been adopted, in 1954, *before* the conduct occurred, and it had been provided in the Rules that "wilful breach thereof shall be punished by reprimand, by suspension, or by disbarment."

Both cases involved the violation of specific rules published in advance. They could hardly give notice that the court would feel free to make up new rules as it went along and apply them to past conduct. Both cases were decided before the Amended Rules went into effect on January 1, 1957. On that date the Supreme Court adopted all 47 of the Canons of Professional Ethics, and published a limitation on the definition of misconduct. The new rule defined misconduct:

> "XXVII (5) Definition of misconduct. Misconduct, as the term is used herein, shall mean any violation of any provision of any oath of office taken upon admission to the practice of law in this state, or any violation of the Canons of Professional Ethics * * * or the commission or conviction of a crime involving moral turpitude." (Petitioner's Brief, p. 4.)

Petitioner Ruffalo was suspended for "misconduct" with no evidence that he had committed any crime involving moral turpitude; that he had violated any Canon of Professional Ethics; or that he had violated whatever oath of office was administered on his admission to practice. He was denied substantive due process—fair notice that his actions would be considered "misconduct" as defined. The Amicus Curiae brief wholly fails to meet this charge.

OTHER CASES FURNISHED NO GUIDELINES.

The Amicus Curiae brief cites many cases where discipline was imposed and argues that no Canon was violated in those cases. The argument ignores the fact that the conduct involved was either criminal, or of a type universally condemned as professional misconduct.

In *Reyburn v. Minn. State Board of Optometry* (1956) 247 Minn. 520, 78 N. W. 2d 351 a license was suspended for using a "steerer" to run business in return for

kick-backs. "Unprofessional conduct" was in fact defined in the applicable Regulations as including "the employment of 'Cappers' or 'Steerers' to obtain business" and "splitting or dividing a fee."

Bell v. Board of Regents of U. of N. Y., 295 N. Y. 101, 65 N. E. 2d 184 suspended a dentist for hiring a runner to contact prospective patients, bringing them to respondent, and splitting the fee on a percentage basis. This is universally condemned in all professions.

In re Rouss, 221 N. Y. 81, 116 N. E. 782 concerned a lawyer who was guilty of a criminal conspiracy to obstruct judgment by spiriting away a witness. He took statutory immunity and testified against his co-conspirators. There was no doubt he had committed a felony, and the case held only that his immunity from prosecution did not confer immunity from disbarment.

People, ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487 held only that a lawyer who refused to testify in an ambulance chasing investigation could be jailed for contempt. It says nothing about disbarment, nor does it accord with later decisions that would have extended the protection of the Fifth Amendment to the witness.

Kingsland v. Dorsey, (1949) 338 U. S. 318 involved actual fraud in palming off a spurious document.

People, ex rel. Chicago Bar Ass'n v. Mall, 354 Ill. 323, 188 N. E. 449 involved only censure for the "loose and indiscriminate use" of two names by the same lawyer. More serious charges of deliberate deception were dismissed.

Tennessee Bar Assoc. v. Freemon, (1961) 50 Tenn. App. 567, 362 S. W. 2d 828, sustained disbarment of a lawyer who both procured adultery and then committed

criminal trespass and felonious breaking and entry to photograph the act.

In *State, ex rel. Okla. Bar Assoc. v. Ablah,* (1959) 348 P. 2d 172 an apparently psychopathic lawyer made multiple anonymous lewd and harassing telephone calls to an enemy—conduct which is clearly a felony.

In re Howell, 10 N. J. 139, 89 A. 2d 652, concerned a lawyer who flogged a defenseless citizen with a hose and a whip. He pleaded non vult contendere to the criminal charge. He was suspended for violation of Canons and for crime involving moral turpitude.

In re Aydelotte, (1923) 200 N. Y. S. 637 deals with suspension for threatening to breach confidentiality. The lawyer coerced payment of a fee bill by threatening to reveal criminal conduct of his client. This is tantamount to extortion.

Hartford County Grievance Committee v. Cole, (1960) 22 Conn. Sup. 86, 161 A. 2d 590, involved an elaborate scheme for solicitation of business which the Committee found violated Canon 27. The court merely reprimanded the attorneys.

In re Copland, 66 Ohio App. 304, 33 N. E. 2d 857 suspended a lawyer for outright undeniable fraud involving moral turpitude.

In re Brown, 389 Ill. 516, 59 N. E. 2d 855, concerned a fraudulent scheme to overcharge, pool the kickbacks into a secret fund, and use the money for bribing public officials. *In re Alschuler,* (1945) 388 Ill. 492, 58 N. E. 2d 563, had similar facts. The wrongful conduct was not merely "unbecoming." Bribery of public officials is forbidden both by statute and by Canon.

In re Disbarment Proceedings, (1936) 321 Pa. 81, 184 A. 59, concerned participation in the numbers racket,

and also in a drunk driving defense racket wherein bail procurers would run the accused to the lawyer. The court found violation of Canon 28, and systematic obstruction of justice.

In re Davis (1937), 299 N. Y. S. 632 holds that a lawyer can be disbarred for aiding and abetting the numbers racket in violation of New York Penal Law 974.

Fellner v. Bar Assoc. of Baltimore City, 213 Md. 243, 131 A. 2d 729, concerning the systematic and prolonged feeding of slugs into a parking meter, deals with criminal acts where moral turpitude is apparent. The lawyer could have been jailed as well as disbarred.

In all of these cases the facts support the Ohio definition of misconduct—either crime involving moral turpitude or violation of a Canon. The case of *In re Maley,* 363 Ill. 149, 1 N. E. 2d 495 (1939) is different. There the misconduct was in the presence of the court, when the lawyer repeatedly appeared in court when drunk, once slept through most of the hearing, on another occasion was highly discourteous and disrupted proceedings, and twice had to be led out of court. Apparently there is no Canon prohibiting drunkenness specifically, but at least there were previous Illinois cases, cited in the opinion, where drunkenness justified disbarment, so that respondent had notice by an established line of decisions.

ORLANDO'S WORK WAS NOT WRONGFUL.

It is the law in Ohio that an hourly employee may, after hours, work for another, so long as the type of work he does is not inconsistent with the duty he owes each employer. A mechanic who operates a lathe on the first shift for Ford could doubtless run a milling machine on the second shift for Chevrolet; but a designer developing a new model for Dodge should not design a new model for Pon-

tiac at the same time. It is said in 35 *Ohio Jurisprudence* 2d, 703, § 82:

> "An employee employed for a specified number of days in the week is entitled to the remainder of the time to do such other work as he chooses, providing it is not inconsistent with his duties to his employer."

Orlando's only duties to the B. & O. were to inspect air brakes properly. Nothing he did for Ruffalo was inconsistent with his job of bleeding air from incoming trains. Of course, it would have been wrong for him to steal trade secrets, as in *U. S. v. Procter & Gamble Co.*, 47 F. Supp. 676. It would have been wrong for Orlando to induce another employee to steal confidential information from the files, and participate in the use of it, as in *N. L. R. B. v. Clearwater Finishing Co.*, 203 F. 2d 938. It would have been wrong for Orlando to join with other employees to solicit cases for an out-of-state lawyer, as in *Atchison, T. & S. F. Ry. Co. v. Andrews*, 338 Ill. App. 552, 88 N. E. 2d 364. The Amicus Curiae brief misquotes this case, implying mere investigation by an employee was characterized as a "new low." Not so. The Yardmaster in that case was actively soliciting and getting other employees to solicit and run cases, for a split of the fee.

In *Brotherhood of Railway and Steamship Clerks, etc. v. Atlantic Coast Line R. Co.*, 154 F. Supp. 71, 75; aff'd 253 F. 2d 753, 758, there was far more than mere investigation. The employee was discharged because he went onto company property where he had no right to be, procured a door to be unlocked which should have barred his presence, brought in an outsider, a photographer, to trespass on company property, and then helped the trespasser get the photographs he wished. The railroad claimed the act was "an unwarranted trespass on property of the company" (154 F. Supp. at 73) and discipline of the employee was sustained.

The facts are quite similar to the case of *Brotherhood of Railroad Trainmen—Cleveland, Chi. & St. L. Ry.*, Award No. 3624, 21 N. R. A. B. 63, First Division (1939). There the Board held that the employee could be discharged when he took an outsider to the scene of the accident to take photographs, which the outsider then used to solicit legal employment, all under an arrangement with a disbarred attorney, in no way representing the decedent's estate.

The Amicus Curiae brief says that:

> "In light of this decision it is unlikely the Board would approve the hiring by a lawyer of a railroad employee, as an undercover agent, to develop evidence for use in suits against his employer."

Not so. The Board stated in this very opinion that it would *approve* of the type of work Orlando did. The exact language of the Board is:

> "On the other hand there is no doubt whatever of the right of an employee, when off duty, to assist an injured employee or his representative *in any manner including the gathering of evidence*, and so long as it is limited to the development of truth it cannot be regarded as disloyalty nor afford just grounds for discharge." (Emphasis added.)

Petitioner Ruffalo knew of this Railway Adjustment Board ruling, applicable to the very district where Orlando worked. He tried to tell the Bar Committee there was such a ruling (A. 132a, 133a). They would not believe it, and insisted Ruffalo must have known it was wrong. Ruffalo's answers demonstrate his claim of right:

> "He had a perfect right to do that, as long as he does not go on their property or take photographs on their property or anything like that. His time is his own. * * * There was nothing wrong with it. It was perfectly proper for him to be able to do those things.

> * * * On his own time, in his time off, he has a right to do whatever he wishes * * * I don't see that there was anything wrong in investigating a case which he had not in any way brought into my office or had anything to do with * * * No, I didn't interpret it as being morally wrong * * * I can see no wrong in a man doing it on his own time * * *" (A. 123a-126a).

Is it really "unbecoming a member of the bar" who specializes in railroad cases to believe that he can follow the teaching of the National Railroad Adjustment Board, when the statement of the Board has never been reversed or modified by any later Board ruling or court decision? There is nothing in the history of seven centuries of discipline of the bar that should have warned Petitioner Ruffalo he could be disbarred for having a Saturday employee interview witnesses in cases involving the Friday employer. There was no theft from files, no breach of confidence, no slanderous charges against the general employer, no unfair labor practice, no trespass, no fraud, no chicane, and no solicitation or running of business. No canon was violated. No crime was committed. There was no disrespect to any court or the staff of the court. There was no injury to the rights of any client. On the contrary, the clients were well served.

Petitioner's disbarment was arbitrary, unwarranted, and in violation of his constitutional rights. It should be reversed.

Respectfully submitted,

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